Date: 10/31/1994

Case No. 93-STA-35

In the Matter of

DWIGHT E. TOLAND

Complainant

vs.

BURLINGTON MOTOR CARRIERS, INC.

Respondent

APPEARANCES:

Dwight E. Toland
Columbus, Ohio
Pro Se

Michael Asensio, Esq.
Ellen Garling, Esq.
Baker and Hostetler
Columbus, Ohio
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. § 2305, and the regulations found at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules, or who refuse to operate a vehicle when such operation would be a violation of those rules.

STATEMENT OF THE CASE

The Complainant, Dwight Toland ("Toland"), filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration (OSHA) on September 14, 1992, alleging that the Respondent, Burlington Motor Carriers, Inc. ("Burlington"), had terminated his employment in violation of the STAA.

Toland, who was a driver-trainee during relevant time period, alleges that he was forced by his Burlington driver-trainers to submit falsified logs, and ordered to forego Department of

Transportation (DOT)-mandated safety inspections. He contends that his employment was terminated because he complained to Burlington about the violations, and threatened to report the violations to the DOT.

The Secretary of Labor, acting through a duly-authorized agent, investigated the complaint. On June 29, 1993, he dismissed the complaint, based upon his finding that Toland's allegations were without merit (Ad. Ex. 1)[1]. The Complainant filed a timely objection to the findings by means of a letter dated July 16, 1993, and the matter was referred to this office for a hearing (Ad. Ex. 2).

A formal hearing was held in this matter on November 30 and December 1, 1993, in Columbus, Ohio, before the undersigned. At that time, the parties were afforded full opportunity to present evidence and argument.

ISSUES

The sole issue for determination in this case is whether Toland was discharged from employment with Burlington as a result of having engaged in protected activity.

STIPULATIONS

Pursuant to my prehearing order, the parties were instructed to confer and to prepare a stipulation of facts which are not in dispute. Each party submitted a document containing proposed stipulations of fact (Ad. Exs. 9, 21). A comparison of the two documents reveals that the following facts are not in dispute:

1. The Complainant is an "employee" as that term is defined in 49 U.S.C. § 2301;

2. The Respondent is an "employer" as that term is defined in 49 U.S.C. § 2301;

3. Burlington hired Toland as a driver/trainee in August, 1992; and,

4. On or about September 14, 1992, Toland filed a complaint under the STAA with the Secretary of Labor, OSHA.

Based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough

[1]In this Decision, "Com. Ex." refers to the Complainant's Exhibits, "Res. Ex." refers to the Respondent's Exhibits, "Ad. Ex." refers to the Administrative Exhibits, and "Tr." refers to the Transcript of the hearing.

analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Toland's short-lived career at Burlington began with his attendance at a three day orientation program on August 17-19, 1992 (Tr. 202). During the orientation, trainees receive instruction on how to drive defensively, how to fill out their log books, and on various Burlington policies and procedures (Res. Ex. D; Tr. 159). John Pinckney ("Pinckney"), Burlington's Safety Manager, presented the portion of the orientation program dedicated to teaching the trainees logging procedures and DOT safety regulations (Tr. 417-18). He testified that the trainees were instructed to comply with DOT hours of service regulations[2], and to fill out their logs accurately (Tr. 418-19). Toland's own testimony supports Pinckney's testimony in this regard (Tr. 253-54, 330-31).

Pinckney also testified that the trainees were admonished not to submit false logs, which could subject Burlington to substantial fines from regulatory agencies (Tr. 418). He stated that the trainees were instructed to call him immediately in the event they were being required to falsify logs by their trainer (Tr. 421). Toland could not recall whether Pinckney covered false logs in his presentation. He also could not recall whether he had been instructed to contact the Safety Department if asked to do anything illegal (Tr. 331). Toland's purported lack of memory in this regard is wholly unconvincing in light of the minute detail in which he recalled other portions of Pinckney's presentation. In

---

[2]Hours of service regulations are DOT limitations on the number of hours a commercial truck driver may operate his or her vehicle before stopping for rest. There are three such regulations relevant to this proceeding. Briefly summarized, the "ten hour rule" states that a driver may accumulate a maximum of ten driving hours before stopping for eight hours of off-duty time. The "fifteen hour rule" applies to time spent on duty, but not driving, such as loading and unloading, vehicle inspections, etc., and requires that a driver accumulate no more than fifteen duty hours (which includes driving and non-driving time) before stopping for eight hours of rest. Finally, the "seventy hour rule" forbids the accumulation of more than seventy total duty hours in an eight day period. These regulations are contained in the Federal Motor Carrier's Safety Regulations, 49 C.F.R. § 395.3. In addition, the regulations allow the required off-duty time to be cumulated in the sleeper berth, provided certain conditions are met. Id. at § 395.1(h).

addition, his signature appears on a document he signed during orientation which provides, in part: "If you are having problems completing your logs as required by the DOT and the Company, contact the Safety Department." (Res. Ex. F).

Upon completion of the orientation program, Toland was assigned to drive with Burlington trainer Matt Tobin ("Tobin") on August 20, 1992 (Tr. 202). Toland testified that Tobin engaged in a number of safety violations. He stated that, immediately after picking up their truck, Tobin opted not to go through the Burlington safety inspection lane, because to do so would have taken too long (Tr. 218). He further testified that on two occasions, he began conducting DOT-mandated vehicle inspections, but was stopped from completing them by Tobin, who insisted they would take too long (Tr. 223-27). Toland acquiesced, and logged an inspection in his log book as having taken fifteen minutes, despite the fact that no inspection was conducted (Tr. 227). Toland summarized a vehicle inspection in great detail at the hearing, and stated that a proper inspection could not be completed in fifteen minutes (Tr. 224; 228-33). Toland also claimed that Tobin told him never to log more than fifteen minutes for time spent on duty, but not driving (Tr. 219). Finally, he claimed that Tobin instructed him to figure the number of hours driven by dividing the total number of miles driven by fifty miles per hour, instead of logging the actual time driven (Tr. 219-20, 222).

After leaving from Daleville, Indiana on August 21, 1992, Toland and Tobin stopped in Franklin, Ohio at Toland's request, in an attempt to pick up an unemployment check (Tr. 219-20; Res. Ex. EE[3]). Continuing on, they managed to make it as far as Dayton, New Jersey, apparently without any major incidents. Once at their destination, they unhooked their trailer and proceeded in the tractor to the grocery store (Tr. 221). Toland testified that he and Tobin agreed to split the cost of the groceries fifty-fifty, at Tobin's suggestion. However, once in the store, Tobin began selecting expensive items, such as lobster, while Toland was selecting relatively cheaper items, such as bologna. Id. Toland stated that he became concerned because, not having worked in over a year, he did not have a great deal of money, and he did not want to subsidize Tobin's more expensive tastes. Id. Toland testified that, as a result, a "discussion" ensued, and that ultimately it

[3]Respondent's Exhibits EE and NN are identical. Both are "reconstructed" logs, i.e. logs which the Complainant prepared after the fact concerning his driving during the period of August 21-31, 1992. The original logs for this period were no longer available, having been discarded by Burlington after six months as part of a routine purging procedure (Tr. 12). The Complainant was able, through OSHA, to obtain copies of his actual logs for the period of September 1-7, 1992 (Res. Ex. II).

was agreed that each man would pay for his items separately (Tr. 221-22).

Upon returning to the tractor, they began working on their log books (Tr. 222). Toland testified that Tobin instructed him to calculate their driving time by dividing the total number of miles driven by fifty miles per hour[4]. Toland claims he objected, and left to telephone Burlington to report Tobin, which required him to walk approximately two miles to a pay phone. Id. While on his way to the phone, Toland saw Tobin drive off in the tractor and, thinking that Tobin was leaving with his possessions, he called the police (Tr. 222-23). By the time the police arrived, Tobin had returned, and the police settled the matter by allowing Toland to retrieve his possessions and vacate the tractor (Tr. 223).

Toland stated that he then spoke with John Patrick ("Patrick"), Burlington's Trainee Fleet Manager, and complained that his trainer was instructing him to ignore DOT regulations (Tr. 223). Patrick responded by assigning Toland to a new trainer, Jerry Neighbors ("Neighbors") (Tr. 227).

Tobin's version of these events was far different. He testified that they did, in fact, go through the inspection lane at Burlington's Daleville facility (Tr. 469-70). He denied instructing Toland to forego inspections, to log inspections which were never conducted, or to calculate driving time by dividing the actual miles driven by fifty miles per hour (Tr. 468-71). As to the grocery store incident, Tobin testified that Toland began to get upset whenever Tobin picked out an item Toland believed was too expensive (Tr. 474). He stated that when he picked out deli-sliced roast beef, rather than Oscar Meyer bologna, Toland threw a "tantrum", cursing at Tobin and yelling that he (Toland) could not afford to eat like that (Tr. 474-75). Tobin testified that he had agreed prior to the trip to pay for all of the items, after which Toland would make a donation for his "fair share." He attempted to calm Toland by explaining that Toland was not expected to contribute to Tobin's more expensive items (Tr. 475). Toland continued to curse at Tobin, however, and they left the store when it appeared to Tobin that Toland was creating a scene (Tr. 476-77). Tobin paid for all of the groceries, and was never reimbursed by Toland for any of the cost (Tr. 478).

Tobin testified that when they returned to where the trailer was located, Toland accused him of trying to "rob" his trainees, and threatened to get Tobin fired by reporting to the DOT that

---

[4]Presumably, the purpose of calculating driving time in this manner, rather than recording actual driving time, was to maximize available hours of service. By dividing the miles driven by fifty miles per hour, a driver could lessen the impact of time spent in traffic delays, where less than fifty miles were driven in an hour.

Tobin was forcing him to falsify logs (Tr. 479). When Tobin began filling out a trainee evaluation report to document the incident, Toland became increasingly agitated, began to curse at Tobin, and threatened to beat him (Tr. 479-80, 487). Tobin stated that he then dropped the trailer, and drove, with Toland, half a mile to a pay phone, where he suggested they call Burlington and let their supervisors handle the situation (Tr. 480-81). When they arrived at a phone, Toland reached it first, and began to make a call, motioning for Tobin to stay out of earshot (Tr. 481-82). Tobin agreed to move away if Toland would hand over his spare set of keys. When Toland refused, however, Tobin informed him that he was taking the tractor to another phone, and he proceeded to do so (Tr. 482-83).

Tobin then called a Burlington dispatcher, and apprised him of the situation. The dispatcher, who had apparently spoken with Toland in the meantime, told Tobin that Toland had called the police. As a result, Tobin returned to the phone where Toland was waiting (Tr. 483-84). Upon returning, Tobin explained the situation to the police, who then allowed Toland to retrieve his belongings, and required him to hand over his set of keys to Tobin (Tr. 486).

On cross-examination, Toland was evasive concerning the incident. When asked whether he and Tobin had had a dispute over what groceries to buy, Toland responded "I don't care what groceries he buys." (Tr. 346). Later, on rebuttal, Toland claimed that the incident in the grocery store never occurred at all (Tr. 526). He denied being "very agitated", and claimed that Tobin never asked for his (Toland's) set of keys until after the police had arrived (Tr. 346-48). Contrary to his earlier testimony, Toland stated on cross-examination that he "couldn't recall" filling out log books with Tobin (Tr. 350). While he was sure that he had seen Tobin working on his logs at times during the three day period, he "could not recall" whether he and Tobin had ever discussed Tobin's logs. Id. He admitted that, prior to his removal from the truck, he had not complained about Tobin's alleged DOT violations to anyone at Burlington besides Tobin himself (Tr. 351-52).

Patrick testified that when he spoke to Toland during the reassignment of trainers, Toland told him that the problem with Tobin had concerned only a dispute over groceries (Tr. 187). Although he spoke with Toland three times during the reassignment, Toland never mentioned any allegations concerning DOT violations at that time (Tr. 189). The only notation on Burlington's "Driver Training History" form concerning the incident explains that Toland was removed from the truck because "Matt Tobin stated he was impossible to get along with." Res. Ex. I.

Toland's new trainer was Jerry Neighbours ("Neighbours"), who had been a trainer for Burlington for approximately six or seven

months at that time (Tr. 101). Toland testified that Neighbours, like Tobin, also instructed him to falsify his logs at various times. Toland alleged that on August 25th, he drove from Bridgeport to Bloomsburg, Pennsylvania, a distance of approximately 100 miles, and that Neighbours instructed him to log only one hour of driving time (Tr. 237-40). However, Toland's logs for that date are not available, and Neighbors' log, which is available, belies Toland's contention. It shows 1 1/2 hours on-duty, not driving at that time, which presumably was when the trainer was observing, but not driving (Com, Ex. 5). Toland first indicated that he did not complain to Neighbours at that time, for fear of losing his job (Tr. 239-40). Later, Toland stated that he did object, after which he again changed his mind and stated that he might have objected (Tr. 242-43).

Toland testified that Neighbours also instructed him "not to worry" about performing DOT-mandated vehicle inspections (Tr. 244-45). He protested, but went along with the request anyway, in order to keep his job (Tr. 245).

Toland testified that his first major incident with Neighbours occurred in Salisbury, North Carolina, on August 28th, when Neighbours instructed him to log sleeper berth hours for time actually spent unloading the trailer (Tr. 245). Toland claimed that he and Neighbours unloaded the trailer piece by piece, which took some four hours to accomplish (Tr. 245-48). I credit Toland's testimony as to this incident, because it is supported by additional evidence. According to Neighbours' August 28th log, it took only fifteen minutes to not only unload the trailer, but to conduct a vehicle inspection as well (Com. Ex. 5). Pinckney, Burlington's Safety Manager, testified that he had seen drivers who were able to complete a vehicle inspection in twelve minutes (Tr. 421). This would leave a total of three minutes spent unloading the trailer, a wholly implausible scenario. When questioned as to this discrepancy, Neighbours admitted that it had in fact taken longer than fifteen minutes to unload the trailer that morning (Tr. 53-54).

Toland characterized his discussion with Neighbours at that time as "heated", and claimed to have told Neighbours: "This (instructing him to falsify logs) is bull__it. I know I need a job. I know you're havin' me falsify logs and I don't think its fair that you're putting me into this position. . . ." (Tr. 246). Nevertheless, Toland complied with Neighbours' request and logged the unloading as sleeper berth time.

Toland testified that he was then required to drive from Catawbe, South Carolina all the way to Daleville, Indiana, in violation of the ten hour rule (Tr. 248-49). Neighbours' log shows that he took over driving duties at Richwood (Com. Ex. 5). Toland claims that was not the case, however, and stated that Neighbours falsified the log in order to cover up the ten hour violation (Tr.

249). Toland also claimed that Neighbours had him log the sixty mile trip from Lexington to Richwood, Kentucky as taking three hours (Tr. 249-50). This allegation makes no sense, however. Neighbours' log shows 4 1/4 hours of on-duty, not driving time between Lexington and Richwood, which is actually more than Toland alleges. More importantly, if one were trying to falsify logs to free up additional hours, adding time to a trip would be counter-productive.

According to Toland, on August 30th after arriving in Daleville, Indiana, he contacted Patrick, the Trainee Fleet Manager, to complain about being ordered to falsify logs and omit safety inspections (Tr. 251-53). He claimed that Patrick essentially ignored his complaint, telling him that he "better go along" or else he would be discharged under Burlington's policy of allowing only one trainer reassignment (Tr. 253). Patrick denied that Toland had ever complained to him about DOT violations on the part of Neighbours (Tr. 156-57).

Patrick testified that he did speak with Neighbours on August 30, 1992, at a company picnic (Tr. 150-52). He stated that Neighbours informed him that Toland was very hard to get along with; that Toland's name-calling and abusive language were a problem; and that he no longer wanted to be Toland's trainer (Tr. 150). He denied that Neighbours mentioned any DOT complaints by Toland during the conversation (Tr. 152). Neighbours testified concerning the conversation as well. He stated that he told Patrick that he and Toland couldn't get along; that Toland had called him an "a__hole"; and that Toland did not respond well to criticism (Tr. 90). Neighbours testified that he also informed Patrick of Toland's performance problems, such as poor lane control, failing to use mirrors, and failing to pay attention to signs (Tr. 91). Nevertheless, he told Patrick that he and Toland could probably work things out, and he remained partnered with Toland (Tr. 90). Toland's "Driver Training History" form notes a complaint from Neighbours on August 31st, but noted only that Toland was "hard to get along with" (Res. Ex. I).

Neighbours testified that throughout his time with Toland, Toland could not accept constructive criticism or correction concerning his driving, and would respond by calling Neighbours an "a__hole" and a "f___ing idiot" (Tr. 105-06). He complained to his dispatcher that he was fearful of Toland because of his sudden mood swings (Tr. 107). Neighbours testified that after his conversation with Patrick, he talked things over with Toland, and Toland apologized and promised to curb his profane language (Tr. 108). For a few days, Toland's behavior improved, but he soon reverted to his previous ways, cursing Neighbours whenever Neighbours corrected his driving (Tr. 109-10). Neighbours stated that Toland seemed to become irrational, and that he feared Toland would become violent (Tr. 111). On one occasion, Toland threatened to "kick his (Neighbours) ass" (Tr. 112).

Toland's testimony in this regard was extremely contradictory. He testified that he "couldn't recall" ever calling Neighbours names, and he denied ever getting angry when corrected by Neighbours (Tr. 255). In fact, Toland went so far as to say that he never had to be corrected on a driving procedure or technique. Id. Later, he stated that he "might" have called Neighbours an "a__hole" or a "f___in' a__hole" (Tr. 294). Still later, he reversed himself again, and stated that he could "not recall" ever calling Neighbours names (Tr. 528).

Toland alleged a number of additional instances of log falsification by Neighbours during their second week together. He testified that, upon leaving Daleville, Indiana with Neighbours, they proceeded to Taylor, Michigan, where Neighbours stopped to visit his father (Tr. 256). He claimed that Neighbours instructed him not to record the stop on his log (Tr. 261). In fact, no stop in Taylor, Michigan is noted in Neighbours' log for this period (Com. Exs. 1-3). At the hearing, Neighbours admitted that he and Toland stopped in Taylor, Michigan, but claimed he could not remember exactly when (Tr. 44, 92-93). Toland also claimed that Neighbours threatened to have him fired if he told Burlington about the unscheduled stop (Tr. 261). I find sufficient evidence to show that Neighbours may have falsified his log to omit the stop in Taylor, Michigan. However, it is not clear from the record whether this was done to cover up hours of service violations, or simply to avoid having Burlington learn of the stop.

The next falsification alleged by Toland concerned a trip from Piqua, Ohio to West Branch, Iowa. Toland claimed he was instructed to log a stop in New Paris, Ohio at 2 p.m.[5] (Tr. 277). He attempted to show a log falsification by arguing that his log shows the 434.1 mile trip from New Paris to West Branch taking only 5 1/4 hours, which would require an average speed of over 82 miles per hour (Tr. 282). His claim is nonsensical, however. As pointed out by Toland himself, a fuel receipt places Toland and Neighbours in New Paris, Ohio at 12:29 p.m. (Tr. 276-77; Com. Ex. 6). Thus, adding in the additional time, the average speed drops to approximately 62 miles per hour. In addition, as Toland's log lists him as driving the entire trip, no hours of service advantage would be gained.

Toland also alleged that on September 6th, he was instructed by Neighbours to log his arrival in Weatherford, Texas at 12:45 a.m., instead of his actual arrival time of 2:30 a.m., to cover up a violation of the ten hour rule (Tr. 304). Neighbours' log shows off-duty and sleeper berth time from 1:15 p.m. onward on September 5th, and it is unclear why he simply wouldn't have taken over

[5]A fifteen minute break appears in Toland's September 1st log at 2 p.m. However, the name of the town in which the stop occurred is not noted (Res. Ex. II).

driving duties when Toland was approaching a ten hour violation (Com. Ex. 7). Nevertheless, I credit Toland's version of this incident. Toland's log for September 6th, which was turned in to Burlington, contains the following notation: "THIS LOG IS FALSIFIED LOG PER INSTRUCTIONS CO-DRIVER ARRIVED WEATHERFORD TX 2:30 a.m." (Res. Ex. II). In addition, I did not find Neighbours' testimony on this point to have been credible. Neighbours initially "couldn't recall" seeing Toland's log notation, and "didn't remember" whether or not he had instructed Toland to falsify his arrival time in Weatherford (Tr. 97). Later, however, his memory improved dramatically, and he testified that he had, in fact, seen the log notation on September 8th (Tr. 128).

The final events leading to Toland's termination occurred on September 8, 1992. Neighbours testified that when he and Toland arrived at their delivery point in Forrest City, Arkansas, they found plenty of parking available, despite the fact that when Neighbours had called in earlier, he had been informed that there was no parking available (Tr. 114). According to Neighbours, Toland then began "ranting and raving", accusing Neighbours of being a liar and unleashing a stream of obscenities. Id. To make matters worse, their tractor-trailer developed a flat tire and a problem with the air lines, necessitating a lengthy delay while repairs were effected (Tr. 115; Com. Ex. 7). They were finally able to have the trailer unloaded, and were then dispatched to a pickup in Memphis, Tennessee (Tr. 116).

Before they could leave, however, Toland realized that his eyeglasses were missing, and accused Neighbours of stealing them (Tr. 117-18). Neighbours testified that he had nothing to do with the disappearance of the glasses (Tr. 118-19). Toland "couldn't recall" accusing Neighbours of hiding the glasses, but admitted that he threatened to file a police report accusing Neighbours of stealing them (Tr. 356-57). Neighbours offered to help Toland look for the glasses, however, and they were eventually located on top of Neighbours' bunk (Tr. 357-58). Neighbours testified that Toland had not mentioned DOT compliance or violations up to this point (Tr. 78-79). It is unclear who was at fault in the eyeglasses incident. However, the ensuing argument alarmed Neighbours enough to prompt him to call in to Burlington, where he spoke with driver manager/dispatcher Susan Marks ("Marks"). Marks testified that Neighbours called in at mid-morning and reported that Toland had accused Neighbours of stealing his glasses (Tr. 505).

Once back on the road, Toland and Neighbours again began arguing about the eyeglasses. Neighbours testified that Toland then began to call him names, and lunged across the doghouse[6] at

[6]The term "doghouse" refers to the hump in the cab of a tractor which covers the engine, separating the driver and the passenger (Tr. 116).

him (Tr. 116). This startled Neighbours, and he reacted by pulling off of the highway and again calling in to Burlington (Tr. 116-19). Toland admitted that a dispute had arisen over the missing eyeglasses, but denied throughout the hearing that he had lunged across the doghouse at Neighbours (Tr. 302, 355-58, 527). He provided no alternative explanation, however, as to why Neighbours pulled off the road to call Burlington and ultimately, the police. I found Neighbours' testimony to have been more credible concerning this incident.

Upon calling in, Neighbours spoke to Burlington dispatcher Marks, who instructed him to take Toland to the bus station and put him on a bus back to Burlington headquarters in Daleville, Indiana (Tr. 120). Marks testified that she had the authority to fire Toland, and that she was, in fact, firing Toland when she ordered him out of the truck (Tr. 508). She further stated that she had spoken with Patrick after the initial call from Neighbours earlier in the morning, and that they had agreed at that time to terminate Toland's employment (Tr. 509).

Neighbours also testified that during this incident, Toland accused him of forcing Toland to falsify logs, and threatened to report him to the DOT (Tr. 137-39). According to Neighbours, it was the first time Toland had mentioned anything to him about DOT violations (Tr. 138). Neighbours again called Marks at approximately 5 p.m., apparently in an attempt to find out how to pay for Toland's trip back to Daleville. In this conversation, Neighbours related to Marks the fact that Toland was accusing him of falsifying logs in violation of DOT regulations (Tr. 83, 139). Marks admitted at the hearing that she was made aware of Toland's DOT allegations at that time (Tr. 509, 512-13).

Neighbours then returned to the truck, and informed Toland that he was going to take him to the bus station, to which Toland replied "you'll see, you'll see" (Tr. 87, 120-21). Neighbours testified that he was scared by Toland's remarks, and as a result, refused to get back in the truck with him. He again called Burlington, and spoke to the night dispatcher, who instructed him to call a cab to take Toland to the bus station (Tr. 121-22). When the cab arrived, however, Toland refused to leave the truck, and Neighbours again contacted the night dispatcher, who instructed him to call the police (Tr. 122). The police arrived and instructed Toland to gather his belongings from the truck, after which he left in a taxicab (Tr. 122-24).

Toland testified that at some point the next day, September 9th, he spoke to Pinckney, Burlington's Safety Director, and complained about being forced by Neighbours to falsify logs (Tr. 300-01). On September 10th or 11th, Pinckney met with Toland in person to discuss his allegations (Tr. 309-10). Pinckney's notes concerning both conversations are contained in the record (Res. Ex. O). Toland made various complaints concerning incidents where he

was instructed by Tobin and Neighbours to falsify his log entries, and other alleged misconduct on the part of Neighbours having no relation to the STAA. Id. In addition, he submitted to Pinckney a sheet of paper on which he had attempted to document each of the incidents of alleged log falsification (Res. Ex. N). As a result of Toland's complaints, Pinckney ordered an audit of the log books submitted by Toland and Neighbours. Two violations were found in each man's logs: three instances where the "check calls" documented by Burlington did not match the calls noted in the logs, and one instance where the distance between two cities could not have been covered in the time marked in Toland's log entry (Tr. 431-440; Res. Exs. P, Q, W). Burlington found insufficient evidence to make a finding concerning Toland's allegations (Tr. 440-41).

Pinckney testified that he approached Patrick on September 9, 1992, and informed him that Toland had complained to him about being instructed to falsify log entries (Tr. 443). Pinckney stated that he had nothing to do with the decision to fire Toland, and that when he told Patrick of Toland's complaints, Patrick responded that he had already decided to fire Toland because of his behavior toward his trainers (Tr. 443-44). Patrick testified that he had in fact decided to discharge Toland following the incident on September 8th when Neighbours called in to report their dispute concerning Toland's eyeglasses (Tr. 170-72). He admitted that Pinckney had informed him of Toland's allegations as to log falsification on September 9th, but stated that he told Pinckney that Toland was already on his way back to Daleville so that he could be discharged in person, rather than over the phone (Tr. 174-75). Pinckney expressed concern that the discharge, coming so soon after the complaint, could have STAA implications, but Patrick declined to reconsider, as he had allegedly determined to fire Toland before ever hearing about Toland's allegations. Id.

Whatever the machinations occurring at Burlington notwithstanding, it is clear that Toland was not informed that he was being terminated until September 11th (Tr. 303, 365). Toland's contention in this regard is supported by Pinckney's notes. They reveal that when he was put out of the truck on September 8th, Toland believed that he was being called in to Daleville so that his logs could be inspected and his complaints investigated (Res. Ex. O). Patrick explained that the reason Burlington paid to have Toland returned to Daleville was so that he could be fired in person, pursuant to company policy (Tr. 189). However, when Toland finally arrived on the bus, Patrick did not have a company car available to pick him up at the bus station. After waiting for a time, Toland finally decided to take a cab to a motel (Tr. 175). Patrick testified that when Toland called in from the motel, Patrick told him over the phone that he was being fired as a result of his conduct toward his trainers (Tr. 176). Patrick also allegedly reminded Toland that he had been warned that only one trainer reassignment would be permitted. Id. According to

Patrick, Toland made no mention of any DOT violations at the time he was informed of his discharge (Tr. 193).

Toland's testimony did not contradict Patrick's on this point, however. In fact, Toland testified that he could not recall whether it was Patrick or Pinckney who fired him, although he believed it was Pinckney (Tr. 303, 366). He also could not recall what reasons, if any, were given for his termination at that time (Tr. 366).

Burlington's "Driver Training History" form for Toland notes on September 8th that Neighbours called in to report that he and Toland could no longer get along (Res. Ex. I). On the same date, it notes that Toland accused Neighbours of stealing his glasses, and that Neighbours was instructed to put Toland on a bus. Id. No mention is made on that date of a decision to fire Toland; nor is any mention made of Toland having lunged across the doghouse at Neighbours. Id. The "Driver Status Change" form filled out by Patrick which memorializes Toland's termination is incomplete: it refers the reader to comments contained on an "S/R contact screen", apparently a computer file in Burlington's computer system (Res. Ex. K). Those comments were not produced by Burlington at the hearing.

Pinckney prepared a report concerning his investigation of Toland's allegations, despite the fact that Toland had already been discharged from employment (Res. Ex. T). The report essentially parallels Pinckney's testimony at the hearing, noting that two false log entries were found in both Neighbours' and Toland's logs. Id. Toland's problems with each of his trainers were also mentioned. Id. Curiously, however, the report does not even mention that Toland had been fired.

Pinckney's report also mentions the results of a background check on Toland performed at Burlington's request after Toland's discharge. Pinckney testified that he ordered the report because of safety concerns arising from Toland's conduct on September 11th, the day of his discharge and threats of bodily harm allegedly made to his trainers (Tr. 417, 442). The report, prepared by James E. Van Ella and Associates, contains a listing of various criminal charges which have been brought against Toland and their dispositions (Res. Ex. R). Two felony convictions are noted in the report, in 1963 and 1991[7]. Toland admitted that he had marked on

[7]Under the Federal Rules of Evidence, as applicable to these proceedings pursuant to Department of Labor regulations, evidence of a felony conviction older than ten years may not be used to impeach the credibility of a witness. 29 C.F.R. § 18.609(a), (b). However, evidence of Toland's felony convictions has independent relevance in this case, as it bears directly upon the truthfulness of Toland's assertion on his Burlington employment application that

his employment application that he had never been convicted of a felony (Tr. 323-24; Res. Ex. E). He claimed that his 1963 conviction had been expunged, and that he believed he did not have to report it on employment applications as a result (Tr. 324-25). As to the 1991 conviction, Toland testified that he believed that it was also going to be expunged, but that he "could not recall" the process by which this was to occur (Tr. 327).

While Toland's assertion as to the 1963 conviction is plausible, I am wholly unconvinced by his attempt to explain his failure to note the 1991 conviction on his Burlington application. However, I am also unconvinced by Pinckney's explanation as to why the background check was requested by Burlington. Pinckney claimed to have made the request at the time of Toland's termination, because of security concerns raised by Toland's actions on September 11th. The report notes that the request was not received, however, until October 14, 1992 (Res. Ex. R). A separate report by the same company, concerning a check into Toland's employment history, notes a request date of September 15, 1992 (Res. Ex. T, attachment to Pinckney's September 28th report). As the inquiry into Toland's criminal history was not requested until over a month after his termination, and well after the filing of his STAA complaint, I find that it was most likely requested in an attempt to discover additional evidence to justify Toland's termination[8].

Patrick testified extensively concerning Burlington's policy of firing a trainee after failing to get along with two different trainers. He stated that when he explained the training process to the trainees during orientation, he instructed them that they were to cooperate with their trainers (Tr. 159-60). He also stated that he did not like switching trainers, and that only one such reassignment would be permitted (Tr. 160). Patrick admitted that it was common for a personality conflict to develop between a trainer and a trainee (Tr. 163). He also claimed that he had never made an exception to the policy of firing a trainee rather than assigning a third trainer. However, only one trainee other than Toland ever failed to get along with two trainers (Tr. 164). Toland "could not recall" whether Patrick had explained the policy at orientation (Tr. 344). He admitted, though, that Patrick had

---

he had never been convicted of a felony. As such, it was admitted into evidence for that purpose.

[8]Burlington's motivations in conducting the further background check could have relevance in determining the application of the so-called "after-acquired evidence" doctrine in the event I found Toland's STAA complaint to have merit. However, my subsequent determination as to the merits of the claim, infra, render the after-acquired evidence question moot.

told him at the time of his reassignment that he would be fired if he could not get along with his second trainer (Tr. 353-54, 360).

II. CONCLUSIONS OF LAW

Section 2305 provides, in part:

> (a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.
>
> (b) No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 2305 (Supp. 1994).

Claims under the STAA are adjudicated pursuant to the standard articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under that framework, the Complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once a prima facie case is established, the burden of production then shifts to the Respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the Respondent is successful, the prima facie case is rebutted, and the Complainant must then prove, by a preponderance of the evidence, that the legitimate reasons proffered by the Respondent were but a

pretext for discrimination. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987); See also Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The Supreme Court recently addressed the burden-shifting under such statutes in extensive detail in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). In that case, Justice Scalia, writing for the Court, held that in meeting its burden of production, an employer need only articulate a legitimate reason for the adverse action, and that no credibility assessment is appropriate at that time. Id. at 2748. In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the action. Instead, he or she must prove both that the asserted reason is false (i.e. not the true reason for the action), and that discrimination was the real reason for the adverse action. Id. at 2752-56. Such a requirement is necessary in that it is the employee who bears the ultimate burden of persuading the trier of fact that he or she was the victim of intentional discrimination. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. at 253; See also Hicks, supra, 113 S.Ct. at 2751.

To establish a prima facie case of retaliatory discharge, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer. Moon, supra, 836 F.2d at 229. The Secretary has taken the position that, in establishing the "causal link" between the protected activity and the adverse action, it is sufficient for the employee to show that the employer was aware of the protected activity at the time it took the adverse action. See Osborn v. Cavalier Homes, 89-STA-10 (Sec'y July 17, 1991); Zessin v. ASAP Express, Inc., 92-STA-0033 (Sec'y Jan. 19, 1993).

Toland's Prima Facie Case

Protected Activity

Under subsection (a) of § 2305, protected activity may be the result of complaints or actions with agencies of federal or state government, or it may be the result of purely internal activities, such as internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C.A. § 2305(a) (Supp. 1994); Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 1992); Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 18, 1987).

Toland testified that he complained to Patrick about being forced by Tobin to submit falsified logs in violation of DOT regulations (Tr. 223). Patrick denied that Toland mentioned DOT violations on any one of the three occasions on which he spoke with

Toland during his reassignment (Tr. 187, 189). Toland testified that he also complained to Patrick about being forced to falsify logs by Neighbours (Tr. 251-53). Patrick denied ever hearing those complaints from Toland as well (Tr. 156-57). However, various allegations by Toland of complaints concerning DOT violations are uncontroverted by Burlington.

Toland noted a log falsification allegedly ordered by his trainer on his September 6th log, and it is undisputed that the log was subsequently turned in to Burlington (Res. Ex. II). In addition, Neighbours testified that Toland threatened to report his alleged log falsifications to the DOT, and admitted that he, in turn, conveyed Toland's complaints to the Burlington dispatcher (Tr. 83, 139). Neighbours' testimony in this regard was buttressed by the testimony of Marks, the Burlington dispatcher with whom he spoke (Tr. 509). Finally, Toland testified that he spoke with Pinckney concerning alleged log falsifications ordered by Neighbours on September 9th (Tr. 300-01). Pinckney verified such a conversation, and further testified that he in turn conveyed Toland's allegations to Patrick on the same date (Tr. 443). I find that each of these latter three communications by Toland to Burlington personnel is sufficient to constitute protected activity under subsection (a) of § 2305.

Under subsection (b) of § 2305, an employee engages in protected activity when he or she refuses to operate a commercial motor vehicle where such operation would constitute a violation of a commercial motor vehicle rule or regulation, including DOT hours of service regulations. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Aug. 31, 1992). Subsection (b) is not invoked, however, unless there is proof of a work refusal. There was no evidence produced at the hearing of any refusal to drive on the part of Toland. Therefore, I find no evidence to support a finding of protected activity under subsection (b) of § 2305.

Adverse Employment Action:

Although there is some dispute over when Toland's employment with Burlington was terminated, neither party disputes that Toland was terminated by Burlington at some point between September 8th and 11th, 1992. It is also not controverted that Toland was not officially informed of his discharge until September 11th. As the termination of one's employment certainly constitutes "adverse employment action", I find that this element of the Complainant's prima facie case has been established.

Causal Relationship:

The final element of the Complainant's prima facie case is the establishment of a causal link between the protected activity and the adverse employment action. As noted previously, an inference of causation may be raised by proof that Burlington had knowledge

of Toland's complaints at the time it engaged in the adverse employment action. By the same token, however, where it is proven that the employer was unaware of the protected activity at the time of the adverse employment action, no prima facie case can be made. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Dec. 15, 1992).

Toland alleged that he twice complained personally to Patrick about being instructed to submit falsified logs by Tobin and Neighbours, respectively. As noted previously, however, Patrick denied that either of the two alleged conversations took place. See Tr. 156-57, 187, 189. I find no reason to discredit Patrick's testimony on this point, and overall, I found him to be a much more credible witness than Toland. Therefore, the relevant protected activity in this regard consists of the three complaints by Toland of which Burlington was indisputably aware. Toland's September 6th log, which contained a notation that it was falsified on Neighbours' instructions, was not turned in to Burlington until some later date, which was not established at the hearing. The incident in which Neighbours conveyed Toland's threat to contact the DOT to the Burlington dispatcher occurred at approximately 5 p.m. on September 8, 1992. Finally, Toland's complaint to Pinckney, which prompted the log audit, was made on September 9, 1992. Both Patrick and Marks contended, in their testimony, that the decision to discharge Toland was made during the afternoon of September 8, 1992. As a result, a question exists as to whether Burlington had knowledge of any of Toland's protected activity at the time it initiated the adverse employment action.

Marks testified that sometime after 1 p.m. on September 8th, Neighbours called in to report that Toland had continued to argue with him about the eyeglasses, and had lunged across the doghouse at him, causing him to pull off the road (Tr. 505-07). She further stated that she had spoken with Patrick after Neighbours' earlier call, and that they had decided to discharge Toland (Tr. 508-09). According to Marks, by ordering that Toland be put out of the truck during her second conversation with Neighbours, she was discharging Toland (Tr. 508). Patrick testified that after hearing about the dispute over the eyeglasses, he told Marks to put Toland on a bus back to Daleville, so that he could discharge Toland in person, pursuant to company policy (Tr. 171-73). He further stated that, when he finally heard of Toland's DOT allegations from Pinckney on September 9th, he told Pinckney that he had decided to fire Toland the on September 8th, and that Toland was already on a bus back to Daleville (Tr. 174).

After fully considering all of the testimony and evidence on this point, I find insufficient evidence to justify a finding that the decision to discharge Toland was made on September 8th, before either Marks or Patrick had knowledge of his DOT allegations, for the following reasons. Both Marks and Patrick emphasized that by putting Toland out of the truck, they were discharging him, and

that his return to Daleville was a mere formality required by company policy. However, no evidence was produced of a written or formal Burlington policy requiring all discharges to be effected in person. To the contrary, Patrick admitted that Toland was ultimately fired over the phone, because Patrick did not have a company car available to bring him in from his motel. Thus, if such a policy existed, it was not strictly applied. Moreover, it seems unlikely that Burlington would go to the trouble and expense of paying for a bus ticket and a motel room for Toland in order to follow such a policy, only to disregard the policy after getting Toland all the way back to Indiana.

Other evidence belies Burlington's assertion as well. Although the "Driver Training History" form contains a note on September 8th that the dispatcher was instructed to put Toland on a bus back to Daleville, it does not state that Toland was being discharged (Res. Ex. I). Burlington's "Driver Status Change" report, which memorializes Toland's discharge, lists the effective date of the discharge as September 11, 1992 (Res. Ex. K). And finally, Patrick himself testified that such employees are paid up to the date that they are actually informed of the termination (Tr. 189). Based upon all of these factors, I find that Toland's discharge occurred on September 11, 1992, at which time both Patrick and Marks admittedly had knowledge of his protected activity.

In establishing a prima facie case, the proximity in time of the protected activity and the adverse employment action is sufficient to raise an inference of causation. Zessin v. ASAP Express, Inc., 92-STA-33 (Sec'y Jan. 19, 1993); Bergeron v. Aulenback Transp., Inc., 91-STA-38 (Sec'y June 4, 1992). Toland's protected activity took place on September 8th and 9th, 1992, and his discharge occurred on September 11th. I find this proximity sufficient to raise an inference of causation, and as a result, I find that the Complainant has successfully established a prima facie case of retaliatory discharge.

Rebuttal of the Prima Facie Case

Since Toland has established a prima facie case of retaliatory discharge, the burden of production now shifts to Burlington to establish a legitimate, nondiscriminatory reason for Toland's discharge. To carry its burden, Burlington needs only to produce evidence of some legitimate grounds for the termination, a task which involves no credibility assessment at this stage of the proceedings. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).

Patrick testified that his decision to discharge Toland was based on the fact that serious complaints had been lodged against Toland by two separate trainers, and that Toland had been warned that a second reassignment would not be permitted (Tr. 173, 176).

Patrick also considered Toland's conduct, specifically that Toland had falsely accused both trainers of stealing from him (both of which accusations resulted in police being called to the scene); been verbally abusive to both trainers; and lunged across the doghouse at Neighbours (Tr. 171-73; Ad. Ex. 21, Exhibit B (Affidavit of Patrick)). Each of these asserted grounds for the termination, if credited, would constitute legitimate and non-discriminatory grounds for terminating Toland's employment. Therefore, I find that Burlington has successfully carried its burden of production. As a result, it is now incumbent upon Toland to prove that Burlington's asserted reasons are pretextual, i.e. that they were not the true reasons for his discharge, and that retaliation for protected activity was in fact the true motivating factor.

Pretext

I have previously found that certain of Toland's allegations of log falsification on the part of his trainer, Neighbours, have merit. I have also found that Toland took his log falsification complaints to his superiors at Burlington prior to his discharge. At first glance, Toland's discharge from Burlington only a few days after his protected activity suggests a causal connection between the two events. In reality, however, I find that any such connection is illusory.

In addition to his protected activity, Toland's discharge was also immediately preceded by his second major altercation with a trainer in his just over two weeks of employment. The first altercation, with Tobin, arose over the selection of groceries. The second incident, with Neighbours, arose over Toland's accusation, which later proved unfounded, that Neighbours had for some reason intentionally hidden Toland's eyeglasses. Even had both trainers' conduct been as Toland described (which I have found not to be the case), neither would justify the type of hostile response evoked from Toland.

In both incidents, Toland became so belligerent that police had to be called to the scene. Two separate trainers had complained not only about Toland's verbal abusiveness and use of obscenity, but about physical threats as well. Toland is an extremely large man. On his Burlington application, he listed his height as 6'11" and his weight as 280 pounds, and those figures appeared to be accurate from my observation of the Complainant at the hearing. As a result, both trainers were understandably and justifiably intimidated by Toland's threats of physical violence. These incidents culminated in the events of September 8, 1992. On that day, Toland not only became involved in an altercation with Neighbours, but went so far as to move toward Neighbours across the doghouse while the vehicle was in motion.

It was only during the second of these altercations that Toland took his complaints about Neighbours' log falsification to

his superiors at Burlington. At that point, Toland's conduct toward his trainers had regressed to such a point that no responsible employer, in my opinion, would have entrusted him with driving a commercial truck on public highways.

In light of Toland's allegations that he was forced to falsify logs by Neighbours virtually from the start of their training relationship, I find it significant that he waited until after the altercation over the eyeglasses to bring his allegations to Burlington. Pinckney testified that, during orientation, he informed the trainees that log falsification was the most severe type of DOT violation, and instructed them to contact him immediately in the event they were told to falsify logs by their trainer (Tr. 418-21). Toland "could not recall" being instructed to contact the Safety Department in such an event (Tr. 331). I credit Pinckney's testimony on this point. Toland was given a document instructing him to contact the Safety Department in the event he was "having problems completing [his] logs as required by the DOT" (Res. Ex. F). Furthermore, when Toland finally did make a complaint to Pinckney, Pinckney confronted Patrick with it the very next morning. In sum, I find that most likely scenario was that Toland, who had experience with STAA claims (Res. Exs. CC, DD)[9], viewed Neighbours' log violations as a means of gaining leverage on Burlington in the event it attempted to fire him for his unacceptable behavior toward his trainers.

I have fully considered the possibility that, were it not for Neighbours' log violations, his altercations with Toland would never have occurred. An employer may not provoke an employee to the point of committing an indiscretion and then seize on the incident as a legitimate rationale for discharge. Moravec v. HC & M Transp., Inc., 90-STA-44 (Sec'y Jan. 6, 1992), citing Monteer v. Milkway Way Transp. Co., 90-STA-9 (Sec'y Jan. 4, 1991). In Moravec, the Secretary found that the employee's challenge of a supervisor to a fight did not justify termination where the challenge was spontaneous and provoked by the employer's unlawful conduct. Id. The Secretary emphasized, however, that, no blows having been struck, the employee's conduct in that case was not egregious. Id.

In the instant case, however, while Neighbours may have engaged in log falsification, it was Toland's false accusation that Neighbours stole his eyeglasses which prompted the outburst that

[9]Evidence of prior acts is not admissible to prove the character of a person in order to show action in conformity therewith. 29 C.F.R. § 18.404(b). It is admissible for other purposes, however, such as proof of a plan, or knowledge. Id. To that end, I have considered Toland's prior STAA actions only to the extent that they reflect his knowledge of the STAA and its protections.

led to Toland's dismissal. Moreover, Toland's behavior, which included not only abusive language and threats of violence, but a lunge across the doghouse at the driver of a moving vehicle, was egregious by any standard. Therefore, I conclude that Toland's complaint should be dismissed.

In evaluating the entire record, I conclude that the overwhelming weight of the evidence demonstrates that the reasons advanced by Burlington for Toland's discharge are legitimate and not pretextual. The evidence in this case is susceptible to no conclusion but that Burlington would have reached the same employment decision even in the absence of the protected activity in which Toland engaged.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of Dwight E. Toland be DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order an the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).